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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 286

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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November 4, 1966

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PETITION FOR REHEARING

Alabama-Tennessee Natural Gas Company, Petitioner herein, prays that this Court grant rehearing of its order of October 10, 1966, denying the petition for a writ of certiorari in the above-entitled case and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the instant case as prayed for in the petition filed herein

on June 23, 1966. In support of this petition, Petitioner respectfully shows as follows:

1. Critical to the determination of the ultimate issue herein is the matter of Congressional intent. All parties recognized that Congress, in enacting the liberalized depreciation provisions of Section 167 of the Internal Revenue Code, intended to encourage business investment and hence to stimulate the economy. The Commission, in its opinion, held that the reduction of rates resulting from passing through the benefits of liberalized depreciation would effectuate this Congressional intent. The Commission reasoned that lower rates would increase demand by stimulating purchases and thereby also stimulate the economy (R. 148-9). In our petition for certiorari (at pp. 14-18), we urged that Congress had specifically rejected such an *indirect* method of stimulating the economy and that it had rather intended, by Section 167, to provide a *direct* stimulus to businesses in the form of increased after-tax revenues and cash flow to businesses investing in new plant.

Since the issuance of this Court's order, Congress has enacted Pub. L. No. —, 89th Cong., 2d Sess. (H.R. 17607).[1] This legislation *inter alia* suspends the provisions of Section 167 of the Internal Revenue Code with regard to certain types of property constructed or acquired during the period from October 10, 1966, to and including December 31, 1967. The history and purpose of this legislation demonstrate that our read-

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[1] Although not signed by the President at the time of drafting this Petition, the new legislation reflects, in substance, his recommendations to Congress and, hence, undoubtedly will be approved within the constitutional period.

ing of the Congressional intent underlying Section 167 is correct and that that of the Commission is in error.

Thus, the Senate Committee on Finance, in recommending passage of the legislation suspending Section 167, described it as "an integral part of a coordinated anti-inflationary program * * *" (S. Rep. No. 1724, 89th Cong., 2d Sess. p. 1), and commented that "[b]y removing certain tax incentives for investment in machinery, equipment, and buildings, the bill will ease inflationary pressures in those sectors where demands for output are straining present productive capacity" (*Id.* at p. 4). One of the principal purposes of the legislation is to "* * * promote the early reduction in interest rates," which are "now the highest * * * since 1930" (*Id.* pp. 5, 11). Since, in addition, the suspension of Section 167 provided in the recent legislation is only for a relatively short period of time, Congress obviously envisioned the Section 167 stimulus (now suspended in part) as having operated *directly* as tax relief to business, not *indirectly,* as the Commission contends, through the time-consuming route of increased sales resulting from lower prices. That such was what Congress had in mind is further reinforced by the fact that, contrary to the attempted differentiation by the Court below (Pet. App. p. 23a, fn. 28), the Committee reports make clear that Congress regards liberalized depreciation as providing basically the same *direct* and *immediate* type of stimulus as that provided by investment tax credit.

2. The recent enactment of Pub. L. No. —— (H.R. 17607) is significant in still another respect. Both the Commission (R. 142) and the Court below have recognized (Pet. App. pp. 28a, *et seq.*) that the

Commission's finding that Petitioner's use of liberalized depreciation resulted in a permanent tax saving, not just a tax deferral, is critical to its ruling herein. According to the Fifth Circuit (Pet. App. p. 28a): " 'below normal' depreciation in older assets is counter balanced by 'above normal' depreciation on new assets *as long as the company continues the use of liberalized depreciation* and continues to make at least some capital additions." (Emphasis supplied)

However, while the Court below went on further to recognize that the Commission conclusion was based on a "reading of the future" (Pet. App. p. 33a), it failed to take into account, in affirming what it characterized as Commission "clairvoyance" (*Ibid.*), the possibility that Congress might suspend and even repeal Section 167. This, despite the fact that the Commission, in arriving at its conclusion, expressly declined to allow for such possibility, stating "[w]e cannot justify the imposition of tax burdens upon the ratepayers on the basis of suppositions and speculations as to the course of future amendments of the Federal income tax laws" (R. 139).

While the suspension provided in the new Act does not extend to all new investments by pipeline companies, the new statute does withhold the " 'above normal' depreciation"—needed on the Commission's thesis to achieve a tax saving—with regard to new buildings acquired or constructed by pipeline companies during the suspension period. Thus, the new legislation effectively undercuts the basic thesis of the Commission.

The new statute also forcefully demonstrates that the possibility of substantial modification and even

repeal of Section 167 is not to be brushed aside lightly and hence, contrary to the Commission, must properly be taken into account in determining whether liberalized depreciation results in a tax deferral or a tax saving. To this should be added the further fact that the other findings on which the Commission based its tax saving conclusion are highly controversial; are admittedly speculative; are in sharp contradiction to the Commission's own findings when it had viewed liberalized depreciation as resulting in a tax deferral; and are themselves founded upon predictions and estimates culled from secondary sources *de hors* the record and not subjected to the test of cross-examination or rebuttal. Since the Commission's ultimate finding of "tax saving" is thus patently founded upon weak reeds, whereas the consequences flowing therefrom are admittedly important and far reaching, the affirmance by the Court below of the Commission's conclusion plainly calls for review by this Court.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully submitted that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

STANLEY M. MORLEY

November 4, 1966